

1414522 (Migration) [2016] AATA 3698 (30 March 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Harvinder Singh Bhagtana

CASE NUMBER: 1414522

DIBP REFERENCE(S): CLF2012/62719

MEMBER: Lisa Lo Piccolo

DATE: 30 March 2016

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 30 March 2016 at 5:10pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 12 August 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 21 March 2012 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the relationship was genuine and continuing but instead found that the partnership was entered solely for the purposes of the applicant obtaining residency in Australia. A copy of the delegate's decision was provided to the Tribunal by the applicant.
4. The applicant appeared before the Tribunal on 4 August 2015 to give evidence and present arguments. The Tribunal also received oral evidence from Brooke Laura Parker (the sponsor).
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant and the sponsor were married on 22 October 2011 in Melbourne and a certified copy of their marriage certificate appears on the Department file. There is nothing in the information before me to cast doubt on the validity of the marriage, and it was not disputed by the delegate. The Tribunal accepts that the applicant and the sponsor were validly married under the laws of the Australia, and finds that the marriage is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. Background
12. The applicant is a citizen of India. He is 28 years old. The sponsor is an Australian citizen. The applicant initially travelled to Australia on a subclass 572 student visa on 6 March 2010. The sponsor is 28 year Australian citizen.
13. The applicant and the sponsor first met on a social networking site in August 2011. They became friends and started speaking on the telephone soon afterwards. The sponsor was residing in Geelong and the applicant in Melbourne. The applicant travelled to Geelong to meet the sponsor in person a few days later. After 3 weeks he told her that he liked her and wanted to have a relationship. They were married on 22 October 2011.
14. On 21 March 2012 the applicant applied for the subclass 820 visa and he was sponsored in connection with the visa application by the sponsor. The delegate was not satisfied that there was sufficient evidence to demonstrate that they are in a genuine and continuing relationship. The delegate's conclusions were largely based on concerns that the sponsor continued residing in Geelong with her mother after they were married and that the partnership was entered into solely for the purposes of the applicant obtaining residency in Australia.
15. The Tribunal must consider all the circumstances of the relationship, (including the matters specified in r.1.15A(3)) in determining whether the parties are in a "married relationship" as defined by s.5F, and whether the relationship falls within the definition of "spouse".
16. In assessing these issues, the Tribunal has had regard to documents on the Departmental file as well as the documents submitted to the Tribunal. This includes statutory declarations from friends and family regarding the relationship, relationship statements by the sponsor and the applicant, joint bank statements, residential lease, affidavit from Ajajb Singh (the applicant's father), various correspondence addressed to both the applicant and the sponsor at the same address, as well as photographs of the applicant and sponsor together in various settings.
17. *Financial Aspects of the Relationship*
18. The evidence before the Tribunal supports that the applicant and sponsor have maintained a joint NAB account since December 2011. There are 2 statements in 2012 show a couple of deposits and withdrawals being made between the parties. However, the statements also show that it is only the applicant's salary that is deposited into the account. The sponsor and applicant gave evidence that the sponsor was working on a casual basis during their relationship prior to September

2014, but there is no evidence in the statements that any income earned by the sponsor was deposited into this joint account.

19. The applicant also gave evidence that they were saving to purchase a house and to travel to India and America. There is no documentary evidence submitted which corroborates the applicant's evidence.
20. There is also no evidence that there is any pooling of financial resources or that you share your day to day expenses. The Tribunal acknowledges that the applicant and sponsor are listed as joint tenants at a property in Truganina, a lease which they both say they entered into in August 2014. There is also evidence that the applicant purchased some household furniture in September 2014. The joint bank statements do not evidence any withdrawals for rental payments though there are receipts for a monthly garden levy of \$50 being paid for by the sponsor. All utilities at the property are also held jointly and are also paid for from the joint bank account. There is also evidence that the applicant and sponsor have joint car insurance.
21. The Tribunal acknowledges that there is a statement dated February 2014 wherein the sponsor is listed as the applicant's sole beneficiary to his superannuation fund.
22. The Tribunal places some weight on the pooling of financial resources.
 - *Nature of the household*
23. The Tribunal acknowledges the statutory declaration made by Gurpreet Singh who claims that he was living as a house mate with the applicant in Sunshine. He states that the parties were living together as husband and wife in Sunshine with him for 2 ½ years. The Tribunal places some weight on this evidence.
24. The Tribunal also notes the parties claim to have lived separately on "weekdays" between October 2011 and August 2014. The parties claim that they lived together on weekends and saw each other on weeknights 'sometimes'. The Tribunal acknowledges the delegate's significant concerns regarding the applicant and sponsor's living arrangements and the fact that they did not live together as spouses on a full time basis. The Tribunal was also troubled by these living arrangements and raised this issue with both the applicant and the sponsor at length. In particular, the Tribunal questioned why they had lived separately for almost 3 years after their marriage and then started living together 2 weeks after the delegate refused to grant the visa. The applicant told the Tribunal that the sponsor could not live with him before this because he lived in a share house with other men. He also stated that they had been looking for a house in the area for them to live in for 3 years and could not find one. He said they had made applications and were 'always rejected'. When the Tribunal queried with him the chances that he had been able to find a house within 2 weeks of the Department's decision when he had looking for 3 years, the applicant admitted he had never been "actively looking for a house". The sponsor said that she continued living in Geelong during the weekdays because she was still working there casually and she was an only child. She said she lived with her mother and grandmother who was "a bit sick at that time" and they were very close. She also said that they were looking for a house but had not been able to find one. The sponsor said she did not think the Department's decision had anything to do with the timing of them moving in together.
25. The Tribunal does not accept the parties' explanations for why the sponsor was living in Geelong and the applicant in Sunshine for 3 years after their marriage. On the sponsor's evidence, she was receiving Centrelink benefits and was working only

casually one day a week. Although the sponsor gave evidence that she had applied for jobs in childcare in Melbourne, there is no evidence of this before the Tribunal. The Tribunal finds it implausible that the sponsor was unable to find employment for 3 years. Further, there is no evidence that the sponsor's mother or grandmother was sick and given the Tribunal's other concerns, the Tribunal does not accept this explanation. The Tribunal also does not accept that the applicant and sponsor had been looking for a house for 3 years and were unable to find one until after the delegate's decision. There is no evidence before the Tribunal which supports that the parties had taken any steps to find a rental property, or had intended to live together as husband and wife. The Tribunal infers from the evidence that their decision not to live together was by choice and for convenience.

26. There is limited information as to the parties living arrangements during the sponsor's weekend stays. The Tribunal accepts that the parties stayed together in shared accommodation, however, there is only limited information as to whether the living arrangements of the parties indicates they are in a genuine and continuing relationship. The fact, however, that they have shared the same accommodation since their marriage must be given weight when considering whether the parties are in a genuine and continuing relationship.
27. In relation to the household, although the sponsor gave evidence that the applicant pays the rent and the bills are split between them, there is no documentary evidence before the Tribunal to corroborate this. The bank statements provided do not provide evidence that the rent is paid for from the joint account. There are entries suggesting that the bills are paid for from that account. There are receipts issued by the real estate agent that a garden levy of \$50 has been paid for by the sponsor. There is no other evidence before the Tribunal that demonstrates that the applicants share a household or that they share expenses.
28. Accordingly, the Tribunal places limited weight on this factor.
 - *Social aspects of the relationship*
29. In relation to the social aspects of the relationship, the Tribunal has had regard to the statutory declarations (form 888) submitted in support of the relationship including from the applicant's father and the applicant's friends. The declarations refer to their belief that the applicant and sponsor have a genuine relationship together. The Tribunal has had regard to the parties' evidence that they have socialised with the applicant's friends. As well as the photographs including wedding photographs that the applicant has submitted. The Tribunal places some weight on the photographs and the statutory declarations.
30. In terms of the sponsor's family, both gave consistent evidence that the sponsor's mother and grandmother do not support the relationship and do not spend any time together with the applicant and the sponsor. The sponsor told the Tribunal that two of her friends know about the relationship and attended their wedding. She said that the balance of her family does not know about her marriage to the applicant including her cousin in Geelong. When the Tribunal asked her why she had not told anyone for the past 5 years she said that it was because of the differences in culture she was scared to tell them. When the Tribunal asked whether she had any plan to tell them, she said that she was planning to tell them as soon as possible. When the Tribunal asked why she suddenly wanted to tell them she said she did not know.
31. In circumstances where there is no evidence before the Tribunal that the applicant and sponsor have presented themselves as a married couple to the sponsor's family or

wider community, the Tribunal places limited weight on the social recognition of the relationship.

- *Nature of persons' commitment*

32. In respect to the nature of the parties' commitment, the Tribunal has considered the period of courtship, the duration of the relationship, the length of time they have lived together as well as the degree of companionship and emotional support they have provided each other. The Tribunal notes that after the first time that the parties met in person, the couple became engaged and married in just over 6 weeks.
33. The Tribunal notes that the couple have now been married for more than 5 years although they started living together on a full time basis in August 2014. The evidence before the Tribunal is that the sponsor lived in Geelong with her mother and grandmother during the week and came to Melbourne on Saturday and returned on Sunday afternoon. This means that for 4 years of their marriage, the applicant and sponsor only saw each other on weekends. The evidence suggests that they maintained separate finances during this time and maintained separate households. The Tribunal was troubled by their decision to live separately in the context of them having told the Tribunal that their decision to marry so quickly was because they fell in love with each other and did not want to wait. This then seems at odds with a couple who are then content to live apart from each other for no apparent reason and only see each other on weekends.
34. There is no evidence before the Tribunal regarding the regularity or manner in which they maintained contact during the week. The Tribunal questioned the parties about their knowledge of each other, their families and the pattern of their lives. The Tribunal also questioned the parties about their future together. Their plans for the future were rudimentary. The parties said that they wanted to have children together and wanted to purchase a house, as well as travel overseas to India. However, there is no evidence before the Tribunal that they have taken any steps to advance these plans. When the Tribunal asked the parties about their delay in advancing these plans, the sponsor said they were waiting for the visa to be finalised. The Tribunal does not accept this explanation. If the applicant and sponsor were planning to travel to India and America as soon as possible, the parties would have started pooling their finances and saving money. There is no evidence that the parties have been saving to purchase a home or to travel overseas. The Tribunal is not satisfied that they have demonstrated a knowledge of each other's lives and future plans commensurate with a couple in a genuine and ongoing spousal relationship.
35. It does not appear on the evidence that their relationship has developed since they were married. The parties were unable to provide the Tribunal with any meaningful evidence regarding any social activity that he and the sponsor have shared, and the parties were unable to provide any meaningful evidence about how he and the applicant have spent any of their time together. There is no other evidence before the Tribunal to demonstrate the couple see their relationship as long term, and have a commitment to a shared life together.
36. Overall, there is little information which would indicate that the parties provide the degree of companionship and emotional support which would be expected in a genuine and continuing relationship.
37. The Tribunal has considered all the information before the Tribunal both individually and cumulatively. In view of the above matters, the Tribunal is not satisfied that the

parties share a mutual commitment to a shared life as husband and wife to the exclusion of all others.

38. CONCLUSIONS

39. The Tribunal is not satisfied that at the time of the application and the time of decision the applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is not satisfied that the relationship is genuine and continuing. They therefore do not meet the requirements of s5F(2) for a spouse relationship.
40. Additionally, the Tribunal is not satisfied that at the time of the application and time of decision the applicant and the sponsor live together or do not live separately and apart on a permanent basis. Accordingly, they do not meet the requirements of s5F for a spouse relationship.
41. The Tribunal therefore finds that at the time of the application and the time of the decision the applicant is not the spouse or de facto partner of the sponsor, who is the person who was specified as the applicant's spouse in the Subclass 820 application. Therefore, the Tribunal finds that the applicant does not meet the criterion contained in cl.820.221(1)(b) because she does not continue to meet the criterion contained in cl.820.211(2)(c) for the grant of a Subclass 820 visa.
42. Given these findings the Tribunal is not satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
43. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221(2).
44. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal to establish, that the applicant meets any of the alternative sub criteria in cl.820.211(3), cl.820.211(7), 820.211(8), 820.211(9), 820.221(2) and 820.221(3).
45. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

46. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

47.

Lisa Lo Piccolo
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).